Supreme Court, U.S.
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No. 06-652

IN THE

Supreme Court of the United States

BART DIDDEN, *et al.*,

Petitioners,

v.

VILLAGE OF PORT CHESTER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

MARK S. TULIS
OXMAN, TULIS, KIRKPATRICK, WHYATT & GEIGER, LLP
120 Bloomingdale Road
White Plains, NY 10605
(914) 422-3900

ALAN D. SCHEINKMAN
Counsel of Record
DELBELLO DONNELLAN WEINGARTEN TARTAGLIA WISE & WIEDERKEHR, LLP
MATTHEW S. CLIFFORD
One North Lexington Avenue
White Plains, NY 10601
(914) 681-0200

JOHN E. WATKINS, JR.
WATKINS & WATKINS, L.L.P.
175 Main Street
White Plains, NY 10601
(914) 428-1292

Counsel for Respondents

205321

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. May this Court properly consider the merits of Petitioners' theoretical constitutional claims which have been dismissed as barred by the statute of limitations?

II. Have Petitioners shown compelling reasons to grant the Petition where the Second Circuit decided this case based on the statute of limitations and its determination is set forth in an unpublished summary order which may not be cited as precedent?

III. May this Court properly consider a "governmental exaction" theory which was not pled in the Amended Complaint?

IV. Where a municipality and its designated developer entered into a contract which obligated the developer to redevelop a blighted area and obligated the municipality to pursue condemnation of privately-owned property within the blighted area upon request from the developer, have Petitioners shown that there is a compelling reason to review the determinations of the courts below that a settlement offer made by the developer to the owners of private property in an effort to avoid litigation did not give rise to any constitutional violation?

RULE 29.6 DISCLOSURE STATEMENT

G&S Port Chester, LLC, the only Respondent in corporate form, is a non-governmental limited liability company. It does not have a corporate parent and no publicly held company has any ownership interest in it.

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JURISDICTION

Respondents assert that this Court lacks jurisdiction over the Petition because Petitioners' constitutional arguments do not present a "case or controversy" given that this action was dismissed upon the independent grounds of statute of limitations and waiver, which Petitioners do not contest in this Court.

INTRODUCTION

The Petitioners in this case have presented no "compelling reasons" for this Court to grant their Petition for Writ of Certiorari ("Petition"). Sup. Ct. R. 10. Petitioners have failed to challenge in their Petition the District Court's finding, which was affirmed by the Second Circuit, that the running of the applicable statute of limitations barred Petitioners' claims. The District Court also found that Petitioners had waived their right to challenge the public purpose of the redevelopment project, a finding not disturbed by the Second Circuit. Petitioners have not included in their Questions Presented any question relating to these grounds for dismissal (Pet. at 1) and have not made any argument that the dismissal of their case on these grounds was erroneous, much less that such dismissal presents issues worthy of review by this Court.

Petitioners' attempts to obtain review by casting the Second Circuit's interpretation of *Kelo v. City of New London*, 545 U.S. 469 (2005) to mean that any use of eminent domain within a blighted, urban renewal district is constitutional, as a matter of law, is misplaced. The Second Circuit mentioned *Kelo* only after finding that the District Court properly dismissed Petitioners' claim because the statute of limitations had run. It commented that, even if not time barred, the challenge by these Petitioners to this project was without merit. It did not rule that all challenges to all projects would be barred. In any event, the Second Circuit entered a summary order which may not be cited in any other cases, so the Second Circuit's comment has no application beyond this case.

Petitioners' exaction claims also are unavailing. Petitioners failed to properly plead these claims in their Amended Complaint. Moreover, Petitioners' theory that Respondents' conduct is actionable under *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1974) does not present any compelling reason for granting the writ. As the District Court properly recognized, Petitioners did not have any conditions placed upon the use of their property while they were in ownership. Petitioners' sole claim is that the Village of Port Chester (the "Village") refused to process their application to re-zone their property so as to remove it from the project area. However, since there was a valid, unchallenged public purpose finding, Petitioners had no substantive right to demand that their property be excluded from redevelopment and the refusal to grant their request is not an exaction. To the contrary, the Village sought to have the entire project area redeveloped (including some of Petitioners' properties) and had imposed contractual obligations upon the developer to redevelop the entire area, with financial penalties if it breached. Petitioners formulated a plan to redevelop their properties only after the redevelopment project was well underway. For the Village to agree to Petitioners' belated plan meant the redevelopment would be less extensive than it preferred and create an isolated building lot. In addition, the developer would confront potential liability to the Village for not completing the development. Thus, it would hardly be an 'exaction" to request compensation for these losses.

STATEMENT OF THE CASE

This case involves an effort by Petitioners, who were landowners in a blighted urban renewal district, to belatedly cash in on the hard work and millions of dollars of investment put at risk by a municipality's designated developer to redevelop the long-neglected community in accordance with an integrated plan adopted by the municipality. Petitioners conceded below that they have no issue with the redevelopment project or even with the municipality's public purpose finding authorizing the use of eminent domain. (Pet. App. 52-53). Petitioners could not interest anyone in their properties until several years after the project was underway. At that point, the municipality asked the developer to meet with Petitioners to try to avoid a contested condemnation proceeding. The developer made a good faith proposal, which Petitioners rejected and have since tried to turn into a federal case. The Courts below properly dismissed the action; the Second Circuit's determination was rendered in a summary order which may not be cited in unrelated cases and lacks precedential value.[1]

Starting in November, 1977, the Village adopted a series of urban renewal plans designed to clear and reconstruct blighted, substandard and unsanitary areas of the Village. (Am. Compl., Ex. 1 at 1).[2] Despite repeated efforts and changes

1. While undoubtedly unintentional, the version of the Second Circuit's summary order set forth in the Appendix to the Petition does not contain the prohibition against citation contained in the official version of the summary order.

2. Contrary to Petitioners' assertion (Pet. at 1 n.1), the Courts below did not simply look to the bare allegations of the Amended Complaint. On a Rule 12(b)(6) motion, the Courts below may, and did, consider the written instruments attached to it as exhibits, the materials incorporated in it by reference, documents which, though not incorporated by reference, are "integral" to it, and public documents which may be the subject of judicial notice. *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004); *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991); 2 Moore's Federal Practice (3d Ed.) ¶12.34[2]).

over a nearly 20 year period, these efforts did not succeed. (*Id.*; Am. Compl., Ex. 3 at Ex. A). Nevertheless, Petitioners have never disputed that the areas in question were blighted.

In April, 1998, the Village, after soliciting proposals from prospective developers, selected a proposal from G&S Port Chester, LLC ("G&S") for the redevelopment of the Marina Redevelopment Project Urban Renewal District (the "MUR District") (Am. Compl., Ex. 1 at 2). The project provided for the redevelopment of 27 acres of the Village, the development of 500,000 square feet of modern retail establishments, and the construction of millions of dollars worth of public infrastructure, including: a waterfront park and new sea wall; new water, sanitary and storm sewers, new traffic controls, new street curbs and lights; and the removal of old overhead utility lines. (Pet. App. at 18, 20).

In 1999, the Village conducted a process of public hearings and meetings leading to the adoption, on July 14, 1999, of a Land Acquisition and Disposition Agreement ("LADA") with G&S. (*Id.* at 1-3; Am. Compl., Ex. 3). The LADA, a complicated instrument running 60 single-spaced pages, provided that the Village would sell the land within the MUR District to G&S and that G&S would construct the project on the land, including required public improvements, in accordance with the project plans approved by the Village. (Am. Compl., Ex. 1). The LADA required G&S to implement and construct the project diligently. It imposed liability upon G&S for failure to meet its obligations and required G&S to post substantial security (*Id.* at 41-45, 51-107). In turn, the Village was subject to liability if it breached its contractual obligations. (*Id.* at 53-54).

Since the Village did not then own all of the property in the MUR District, the LADA required that the Village would, upon notice from G&S, proceed diligently to acquire by eminent domain title to privately owned parcels within that area.

(*Id.* at 12-13). G&S was ultimately responsible for the costs of acquisition. (*Id* at 13). In addition, G&S was given the right to proceed on its own (*i.e.*, through negotiation) to acquire title to the privately-owned parcels. (*Id.* at 66).

At the same time that the Village adopted the LADA, it also adopted its Determination and Findings pursuant to Article 2 of the New York Eminent Domain Procedure Law ("EDPL"), concluding that acquisition of private property in the MUR District would be for a public purpose, specifically in order to provide for "the clearance and reconstruction of certain blighted, substandard and unsanitary areas of the Village". (Am. Compl., Ex. 3 at Ex. A).

Petitioners are the owners of certain properties in the Village, located both inside and outside the MUR District. (Am. Compl. ¶36). In 1996, before G&S entered the Port Chester scene, Petitioners attempted to interest CVS, a national pharmacy chain, in constructing a store on their property but were told that CVS had no interest in Port Chester. (Pet. App. at 24-26).

G&S and Petitioners had a long course of dealing and had met repeatedly over the years in an effort to find common ground. (Pet. App. 28). Anticipating that the project would increase development interest in the Village, and possibly trigger interest from CVS, Petitioners Didden and Bologna, in March, 1999, before the adoption of the LADA and the EDPL Determination and Findings, complained to the Village that they would be put at a "unique disadvantage" by the use of condemnation for the G&S project and urged the Village to carve their properties entirely out of the District. (Pet. App. at 24-27).

Petitioners were notified in writing of the public hearing on the proposed LADA and the EDPL Determination and Findings (Pet. App. at 19). However, they did not commence

judicial proceedings to challenge the adoption of the LADA or the July, 1999 Determination and Findings (*Id.*), though state law permitted such challenges.

Because of the project's size and complexity, it proceeded in stages. While the first phase was under construction, the second phase was significantly delayed by a federal injunction lifted on August 8, 2001, (*Id.* at 21), and thereafter by state court stays of the eviction of certain tenants. (*Id.* at 21-22). Despite these difficulties, the development proceeded.

In 2002, G&S announced its intention to locate Walgreens, a national drug store chain, in the "Retail E" section of the project, an area that includes properties owned by Petitioners. (*Id.* at 22). G&S had turned to Walgreens after it could not make a deal with CVS. (*Id.*). In response, CVS turned to Petitioners. (*Id.* at 23). Petitioners entered into a lease with CVS, despite knowing that, under the LADA, G&S might request that the Village pursue condemnation of the portion of their property that was located within the District boundaries. (*Id.*). According to Petitioners, the Village Board reacted positively to the CVS Project and told them to pursue an application to the Village Planning Commission. (Am. Compl. ¶41). However, the Village Attorney told Petitioners that they would need to come to an understanding with G&S in order to be able to proceed with the CVS Project. (*Id.* ¶42). Any such statement would have been entirely consistent with the LADA, which obligated G&S to develop the project, including Walgreens, and required G&S to obtain title from the Village to the privately-owned land, including the property owned by the individual Petitioners within the MUR District.

In November, 2003, at the urging of the Village, representatives of G&S and Petitioners met to discuss a resolution of their differences. Petitioners allege that G&S demanded $800,000 or a partnership interest in Petitioners' CVS

Project or else G&S would proceed with its project, including the condemnation of Petitioners' properties within the MUR District. Petitioners refused the demand (Am. Compl. ¶¶48-49).[3]

Since the November 5, 2003 meeting did not lead to a resolution, a state condemnation proceeding was brought by the Village against Petitioners' properties within the MUR District. (Am. Compl. Ex. 3). Petitioners then initiated this action and unsuccessfully sought to have the District Court enjoin the condemnation proceeding. (Pet. App. 16-59); *Didden v. Village of Port Chester*, 304 F. Supp. 2d 548 (S.D.N.Y. 2004) ("*Didden I*"). The District Court invited Respondents to move to dismiss and, following the submission of written motion papers, the District Court granted the motion and dismissed the Amended Complaint. (Pet. App. at 5-15; *Didden v. Village of Port Chester*, 322 F.Supp.2d 385 (S.D.N.Y. 2004) ("*Didden II*"), *aff'd*, 173 Fed. Appx. 931, 2006 WL 898093 (2d Cir. 2006). In granting dismissal, the District Court relied upon its earlier decision in *Didden I*, as supplemented by the reasons set forth in its *Didden II* decision. (Pet-App. at 7). Petitioners appealed to the Second Circuit which affirmed, by summary order, issued April 5, 2006. (Pet. App. at 1-4).

The District Court held that the action was barred by the statute of limitations. It reasoned that the three year statute of limitations began to run when Petitioners knew or had reason to know of the injury that was the basis of the action. (Pet. App. at 10). The District Court reasoned that the statute began to run on July 14, 1999, when the Village adopted the LADA and the EDPL Determination and Findings, and, therefore, the action

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3. G&S contends that it had valued the CVS deal at $2 million and proposed $800,000 as a figure at which either G&S or Petitioners could buy-out the other in order to avoid litigation. (Pet. App. at 29). If Petitioners had accepted the $800,000 buy-out, Petitioners would also have been paid the fair market value of their property. (*Id*).

was not timely. (*Id*). The District Court rejected Petitioners' argument that they did not suffer any injury until November 5, 2003, when G&S made its settlement demand, reasoning that, as shown by Petitioners' own March 30, 1999 letter to the Village, Petitioners were fully aware that the adoption of the LADA and EDPL Determination and Findings would expose their property to condemnation. (*Id.*). On appeal, the Second Circuit agreed with the District Court, holding that Petitioners had reason to know of their injury as of July 14, 1999, and, likewise, rejected the claim that Petitioners' injury did not accrue until November, 2003. (Pet. App. at 3).

The District Court also concluded that Petitioners had waived their right to challenge the public purpose of the redevelopment project. It concluded that, because Petitioners were fully aware of the consequences of condemnation findings, had notice of the public hearings that preceded the Determination and Findings, and failed to bring a judicial challenge within the time allowed by New York law, it was too late for Petitioners to challenge the Determination and Findings. (Pet. App. at 12-13). The Second Circuit did not discuss this conclusion in its summary order.

While the District Court's dismissal on statute of limitations and waiver grounds by itself disposed of the case, the District Court commented that Petitioners' allegation that G&S had made an "extortionate" demand added nothing of legal significance to their claims. The District Court noted that, as Petitioners themselves acknowledged, G&S had the legal right under the LADA to notify the Village to seek condemnation and, even if G&S asked for money in exchange for giving up its legal rights, that would not give rise to any claim by Petitioners. (*Id.* at 14). The Second Circuit agreed, stating that voluntary attempts to resolve Petitioners' demands were not unconstitutional exaction in the form of extortion. (*Id.* at 4).

The District Court also considered Petitioners' "new" argument that there had been an unconstitutional exaction, concluding that there had been no exaction. No restrictions had been put on Petitioners' property during their ownership. Petitioners had proceeded to seek approvals for their CVS Project knowing that some of their property was subject to condemnation. "Since [Petitioners] concede that the July 1999 findings are unchallenged and their property was appropriately placed in the condemnation zone, the constitutional public purpose requirement has been met". (*Id.* at 12). Petitioners had no other substantive rights other than to receive just compensation. (*Id.*). The Second Circuit agreed.

The Second Circuit heard oral argument on March 24, 2005. Thereafter, this Court, on June 23, 2005, handed down *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655 (2005). The next day, counsel for Respondents wrote to the Second Circuit alerting it to the *Kelo* decision and offering to brief its import on this litigation. However, the Second Circuit did not invite such submissions and decided this case on April 5, 2006, without them.

The Second Circuit, in its summary order, observed that, even if Petitioners' claims were not time-barred, *Kelo* compelled rejection of Petitioners' claim that the Takings Clause prevents the State from condemning their property for a private use within a blighted, urban renewal district. (Pet. App. at 3-4). This observation was directly responsive to the opening statement in Petitioners' Summary of Argument in their main brief to the Second Circuit: "The District Court did not rule upon the merits of Plaintiff's [sic] claim that condemnation of the Subject Properties was undertaken solely for a private purpose in violation of the Public Use Clause of the Fifth Amendment." (Pet. Br. at 13).

REASONS FOR DENYING THE PETITION

I. Because This Action Was Dismissed As Time-Barred And As Waived, And Petitioners Have Not Sought Review Of Those Grounds For Dismissal, This Court Should Not Consider Petitioners' Constitutional Arguments

The District Court dismissed all of Petitioners' claims as time-barred and as having been waived (Pet. App. at 9-10, 12-13). The Second Circuit agreed that Petitioners' action is time-barred (*Id.* at 3) and affirmed the judgment of dismissal. In seeking review in this Court, Petitioners have not included in their Questions Presented any question relating to these grounds for dismissal (*Id.* at 1) and have not made any argument that the dismissal of their case on these grounds was erroneous, much less that such dismissal presents issues worthy of review by this Court. Since this Court will not consider any questions not set out in the petition (Sup. Ct. R. 14), this action will stand dismissed, no matter the resolution of the questions that Petitioners do propound[4]. It is both ancient and elementary that

4. While the Court may consider questions that are "fairly included" within the questions presented (S.Ct. R. 10[a]), questions such as whether the statute of limitations has run, or whether Petitioners have waived their rights, are "analytically and factually" distinct from whether *Kelo* forecloses all claims of private purpose takings and what constitutional limits, if any, are imposed on demands for cash for refraining from the use of eminent domain. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U. S. Phillips Corp.*, 510 U.S. 27, 32 (1993); *Yee v. Escondido*, 503 U.S. 519, 537 (1992) (the question whether an ordinance effected a physical taking did not include the related question of whether it effected a regulatory taking); *Am. Nat. Bank and Trust Co. of Chicago v. Haroco, Inc.*, 473 U.S. 606, 608 (1985) (question of whether a complaint adequately alleged conduct of racketeering enterprise was held not to be "fairly included" in a question of whether the statute requires that the plaintiff suffer damages through defendant's conduct of the enterprise).

where a case is dismissed as time-barred, "the court cannot look into the cause of action". *Mc'Cluny v. Silliman*, 28 U.S. 270, 278 (1830). Because this action has not been timely brought, and Petitioners can no longer contend that it was, the Court may not examine the merits of Petitioners' underlying claims.

This Court reviews judgments, not statements in opinions, an admonition that is applied with special force where the statements raise constitutional questions as it is the Court's practice to avoid the unnecessary decision of such issues. *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 734 (1978). Even if the Court of Appeals makes an incorrect statement in its opinion, this Court does not examine the grounds upon which the Court of Appeals made a correct decision. *Alpha S.S. Corp. v. Cain*, 281 U.S. 642, 643 (1930).

To satisfy the case or controversy requirement of Article III of the United States Constitution, the plaintiff must suffer an actual injury that can be redressed by a favorable judicial decision. *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983). This requirement persists throughout all stages of review. *Honig v. Doe*, 484 U.S. 305, 317-18 (1988). Because the exercise of judicial power under Article III depends upon the existence of a case or controversy, the federal courts lack the power to render advisory opinions. *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993). A case must involve a present, live controversy if the Court is to avoid rendering an advisory opinion on abstract propositions. *Hall v. Beals*, 396 U.S. 45, 48 (1969). The federal courts should not decide a case on its merits if such a decision could no longer provide meaningful relief to the parties. *Christian Coal. of Ala. v. Cole*, 355 F.3d 1288, 1291 (11th Cir. 2004).

No matter what the outcome of the constitutional questions posed by Petitioners, their action has been dismissed as untimely. A favorable decision on the merits of their issues will not change

that result and any opinion on the constitutional issues would be advisory. This case is similar to *Paschall v. Christie-Stewart, Inc.* 414 U.S. 100, 102 (1973), where the holders of mineral rights disputed the validity of tax sale deeds to the mineral rights, claiming that they had not been given constitutionally adequate notice of the tax sales. This Court directed the state court to determine whether the petitioners' claims were barred by the statute of limitations because, if so, any decision by this Court on the constitutional questions would be advisory and beyond its jurisdiction. *Id.* at 101-102. Even the dissent recognized that if a constitutional adjudication is not the only basis upon which a judgment rests, a review of the constitutional adjudication by this Court would be advisory since the judgment would rest, in any event, upon independent grounds. *Id.* at 104 (Douglas, J., dissenting).

Stated somewhat differently, a case is moot where the parties lack a legally cognizable interest in the outcome. *Powell v. McCormack*, 395 U.S. 486, 496-97 (1969); *De La Teja v. U.S.*, 321 F.3d 1357, 1362 (11th Cir. 2003). To have such an interest, there must be an injury that is susceptible to some judicial remedy. *R.C. Bigelow v. Unilever N.V.*, 867 F.2d 102 (2d Cir.), *cert denied*, 493 U.S. 815 (1989). Here, a favorable determination to Petitioners on their questions presented would provide them no remedy as the judgment of dismissal would remain standing on independent grounds. *Pincay v. Andrews*, 238 F.3d 1106, 1110 (9th Cir. 2001) ("Because we conclude that the statute of limitations had run as a matter of law prior to 1989, we need not reach the remaining issues raised by the Andrews regarding the sufficiency of the evidence. Moreover, given that we conclude that their RICO claims were untimely, Pincay and McCarron's cross-appeal raising the issue of election of damages is moot"); *cf. Bogle-Assegai v. Conn.*, __ F.3d __, 2006 WL 3436583 at *12 (2d Cir. 2006) ("Bogle-Assegai's arguments going to the merits of her claims of discriminatory

and disparate treatment are moot in light of the dismissals on the grounds of improper service, sovereign immunity, and untimeliness"); *Comm'r of Pa. Dept. of Pub. Welfare v. Markiewicz*, 930 F.2d 262, 266-67 (3d Cir. 1991) (finding that district court erred in addressing *res judicata* and personal jurisdiction where those issues were not essential to the court's conclusion that it lacked subject matter jurisdiction).

Treating Petitioners' constitutional claims as moot in light of the statute of limitations and waiver dismissal is consistent with this Court's long-standing policy of avoiding constitutional questions where the record presents some other ground upon which the case may be disposed of. *Rescue Army v. Mun. Ct. of City of Los Angeles*, 331 U.S. 549, 569 (1947); *accord, City of Mequite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294-295 (1982). Constitutional questions should be reached only if, after decision of non-constitutional questions, resolving the constitutional questions remains necessary. *Jean v. Nelson*, 472 U.S. 846, 854 (1985); *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 209-10 (1960). The Court should not pass on constitutional questions unless such adjudication is unavoidable. *Jean v. Nelson, supra; Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944). Here, Petitioners' constitutional claims should not be reached because their action stands dismissed on statute of limitations and waiver grounds– independent grounds for dismissal which Petitioners do not question in this Court.

Also relevant here is the well settled practice of this Court not to review a question of federal law decided by a state court where the state court decision rests on a state law ground that is independent of the federal question and adequate to support the judgment. *Lambrix v. Singletary*, 520 U.S. 518, 522-23 (1997). Here, the decision of the Court of Appeals to affirm the judgment dismissing Petitioners' action rests on a ground (statute of limitations) that is independent of the constitutional questions and more than adequate to support the judgment.

II. The Second Circuit's Summary Order Does Not Create Any "Constitutional Immunity", Does Not Have Any Precedential Value, And Does Not Give Cause To Re-Examine *Kelo v. City Of New London*

Petitioners contend that the Second Circuit interpreted *Kelo v. City of New London*, *supra*, to mean that any use of eminent domain within a blighted, urban renewal district is constitutional, as a matter of law. (Pet. at 8). This is not so. The Second Circuit stated only that, even if Petitioners' claims were not time-barred, "to the extent that *they* assert that the Takings Clause prevents the State from condemning *their* property for a private use within a redevelopment district, regardless of whether they have been provided with just compensation, . . . [*Kelo*] obligates us to conclude that *they* have articulated no basis upon which relief can be granted." (Pet. App. at 3-4) (emphasis added). As is evident, the Second Circuit did not hold that all Takings Clause challenges are precluded; it merely held that *Petitioners* had failed to set forth a viable challenge under the facts presented.[5]

That the Second Circuit limited its holding to this particular case is apparent from its use of a summary order. Under the rules of that Court, summary orders are used where the decision is unanimous and the panel believes that no jurisprudential purpose would be served by a written opinion. While the court may append a brief written statement explaining the basis for its decision in its summary order, these statements do not constitute formal opinions, are unreported, and are not be cited

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5. The Second Circuit's statement was a direct response to Petitioners' complaint in their main brief to that Court that the District Court "did not rule on the merits of Plaintiffs' claim that condemnation was undertaken solely for a private purpose in violation of the Public Use Clause of the Fifth Amendment". (Br. at 13).

in unrelated cases before the Second Circuit or any other court. (Second Circuit Local Rule 0.23).[6]

While Petitioners contend that the issues presented are of "broad impact" and that if the Second Circuit's interpretation stands, it will effectively insulate condemnations in redevelopment areas from judicial review, (Pet. at 10), Petitioners' contentions are without proper basis as the lower courts here decided just this case and the Second Circuit's summary order has no precedential value. It is not even proper to cite it in any unrelated case. *Crocco v. Xerox Corp.*, 137 F.3d 105, 108 n.4 (2d Cir. 1998).

Nor would this case present a proper basis for re-examination of *Kelo*. As the District Court found, in denying Petitioners' request for a preliminary injunction, Petitioners have asserted "that they have no issue with the Redevelopment Project itself or with Port Chester's July 19, 1999 finding of public use". (Pet. App. at 52). The District Court noted that Petitioners had "conceded, as they must, that the implementation of the Redevelopment Project was for a public purpose . . ." (Pet. App. at 53). Petitioners, recognizing that a challenge to the Village's 1999 Determination and Findings was futile, had shifted their focus to the claim that, because the LADA had given G&S the

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6. The Second Circuit is presently contemplating a change to its rules which would permit citation to summary orders issued after January 1, 2007. However, the proposed rule would continue to bar citation of summary orders, such as the one here, rendered before January 1, 2007. The summary order in this case contains a legend, required by the Second Circuit's rules, stating: "THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA."

right to request the Village to pursue condemnation[7], the LADA had given the developer a "club" to use against Petitioners in negotiations. (*Id.*). However, this has nothing to do with the public purpose finding, or with *Kelo*.

The Village's public purpose in authorizing condemnation of the private property within the MUR District was "the clearance and reconstruction of certain blighted, substandard and unsanitary areas of the Village", as well as to improve the public access to the waterfront, protect and encourage water-dependent uses, and remediate environmental problems. (Am. Compl. Ex. 3 at Ex. A).

In *Berman v. Parker*, 348 U.S. 26 (1954), this Court held that the use of eminent domain in connection with the

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7. The Village could have refused to proceed with condemnation; however, doing so could have exposed the Village to a contract damage case brought by G&S. This is not any different from the situation where governmental entity enters into a lease or other financial transaction. The legislative branch could choose not to budget the funds to pay the obligation but, if the funds are not provided, the government may be held liable for damages. *See, e.g., U.S. v. Winstar Corp.*, 518 U.S. 839, 870 (1996) (passage of FIRREA, which raised core capital requirements for thrifts and prohibited treatment of supervisory goodwill as an asset, breached thrifts' contracts with the FHLBB and FSLIC to permit thrifts to treat supervisory goodwill as an asset for regulatory capital purposes); *Centex Corp. v. U.S.*, 395 F.3d 1283, 1311 (Fed. Cir. 1997) (passage of legislation which was designed specifically to allow the government to re-appropriate the profits that plaintiffs expected to obtain from a transaction, abrogated the government's obligations under the contract); *cf. Mobil Oil Exploration & Producing Southeast, Inc. v. U.S.*, 530 U.S. 604, 620-21 (2000) (breach by United States of lease contracts granting oil companies rights to explore and develop oil was substantial, deprived the companies of the benefit of their bargain, and amounted to a repudiation of their contracts); *U.S. v. Spearin*, 248 U.S. 132, 138 (1918) ("When the government annulled the contract without justification, it became liable for damages.").

elimination of blight was a constitutionally valid public purpose, notwithstanding that the petitioner's property was not blighted and notwithstanding that petitioner's property would be put into other private hands. Here, that Port Chester's downtown and waterfront area was blighted is not disputed. The government having legitimately found the area blighted, the manner of the drawing of the boundary line is not justiciable. *Id.* at 35-36.

Kelo did not involve a blight-based condemnation and eight of the Justices expressly reaffirmed the continued viability of *Berman v. Parker*[8], as well as that of *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

The majority opinion of Justice Stevens (reflecting the views of five Justices) reflected the Court's endorsement in *Berman* of "the purpose of transforming a blighted area into 'a well-balanced' community through redevelopment." *Kelo*, 125 S. Ct. at 2665. The majority was also well aware that, in both *Berman* and *Kelo*, the private developers were required by contract to use the property to carry out the redevelopment plan, *id.* at 2666 n.15, as is the case here.

In her *Kelo* dissent, Justice O'Connor, joined by two other Justices, agreed that the holding in *Berman* was "true to the principle underlying the Public Use Clause". *Id.* at 2674. In particular, Justice O'Connor recognized that underlying *Berman* was a legislative finding that eliminating the existing property

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8. While some states have recently, as a matter of policy, reconsidered the traditionally broad definition given public purpose, the use of eminent domain for blight removal has not been seriously questioned. In *County of Wayne v. Hathcock*, 471 Mich. 446, 475-76; 684 N.W.2d 765, 783 (2004) while the Michigan Supreme Court announced that it would no longer treat a generalized economic benefit as being a sufficient basis to transfer condemned property to a private entity, it specifically reaffirmed the selection of land for condemnation on the basis of the need to remedy urban blight.

use was necessary to remedy the harm. "Thus a public purpose was realized when the harmful use was eliminated." *Id.* Because the taking directly achieved a benefit, it did not matter that the property was turned over to a private use. *Id.*

Here, in Port Chester, the public purpose was blight removal; that purpose was achieved by the elimination of the blighted areas, no matter what was done with the property thereafter and even if some property within the district was not itself blighted. Justice O'Connor's dissent in *Kelo* objected to the condemnation there because there was no claim that any of the property to be condemned was itself the source of any social harm. *Id.* at 2675. Her concern is not implicated here because of the undisputed finding that the project's purpose was blight removal.

Of the nine Justices who heard *Kelo*, only Justice Thomas questioned the continued viability of the *Berman* precedent. *Id.* at 2685.

Petitioners, while relying upon Justice Kennedy's *Kelo* concurrence, have nevertheless persisted in "making the incorrect assumption that review under *Berman* and *Midkiff* imposes no meaningful judicial limits on the government's power to condemn any property it likes." *Id.* at 2670 (Kennedy, J., concurring). In seeking review of this case, Petitioners claim that *Kelo* creates an immunity from judicial review for urban renewal plans. That Petitioners could not succeed in their challenge – in large measure due to their own concession that the July, 1999 Determination and Findings were valid – does not mean that other petitioners could not succeed in other cases.

Moreover, Petitioners gloss over the significance of the term "redevelopment plan" when they contend that, under the Second Circuit's view, "there can be no judicial review of takings within the area, for as long as the redevelopment designation lasts".

(Pet. at 13). Much depends upon the purpose of the redevelopment. The plan in question here is an urban renewal, blight-removal plan, not simply a plan for economic betterment. *Kelo* indicates that at least eight Justices continue to agree that blight removal is a constitutionally permitted purpose.

Petitioners also do not define the type of challenges that they would wish to bring with respect to takings within an urban renewal area. Of significance, the thrust of Petitioners' challenge all along has been their desire to have the properties that are included within the project area carved out of the project. But, as the Second Circuit recognized, that issue is not justiciable, at least in the federal courts. (Pet. App. at 4). It has always been without question that the issue of the quantity and location of the property to be condemned is purely political and "not the subject of judicial inquiry". *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 709 (1923); *see Berman*, 348 U.S. at 35-36 ("It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."); *Arlington v. Golddust Twins Realty Corp.*, 41 F.3d 960, 963-64 (5th Cir. 1994) (necessity and expediency of exercising condemnation power, and the extent of the appropriation, "are political or legislative, and not judicial, questions, the legislative determination of which is conclusive, and not reviewable by the courts). As articulated in *Rosenthal & Rosenthal Inc. v. New York State Urban Dev. Corp.*, 605 F. Supp. 612, 618 (S.D.N.Y. 1985), *affirmed*, 771 F.2d 44 (2d Cir.), *cert. denied*, 475 U.S. 1018 (1985),

> [o]nce a legitimate public purpose for the overall project is conceded . . . the court cannot get involved

> in parsing the particular degree of public or private motivation behind the inclusion of a particular site in the Project area, so long as that inclusion could rationally be related to the public purpose of the plan as a whole.

Petitioners have not contended that the inclusion of some (but not all) of their properties in the urban renewal project area was irrational.

III. Petitioners' Exaction Argument Was Not Properly Pled

While Petitioners seek to have this Court consider their claim that the developer's alleged demand for cash to relinquish its contractual right to request the Village to condemn their property was improper, Petitioners did not adequately present this claim in their Amended Complaint. That Complaint contained six claims:

a) in the First Claim, Petitioners asserted that they have been deprived of "their privileges, rights and immunities" under the Constitution, including a right "not to be deprived of their property without due process of law or by governmental actions that are unrelated to any legitimate governmental interest." (Am. Compl., ¶¶74,75).

b) in the Second Claim, Petitioners allege they have the right "secured by the Takings Clause of the Fifth Amendment to the United States Constitution, not to have their property taken by the State through the power of eminent domain for a private use, regardless of whether just compensation is given." (*Id.* ¶78);

c) in the Third Claim, Petitioners charge that Respondents' "abuse of the condemnation powers is so outrageously arbitrary, capricious, and irrational as to constitute a gross abuse of governmental authority which has violated [Petitioners']

substantive due process rights under the Fourteenth Amendment to the United States Constitution". (*Id.* ¶82);

d) in the Fourth Claim, Petitioners argue that they have been denied equal protection of the laws, alleging that Petitioners have been intentionally "singled out" for "disparate, unlawful and malicious treatment." (*Id.* ¶85);

e) in the Fifth Claim, Petitioners allege that the Village delegated its eminent domain power to G&S and Gregg Wasser ("Wasser") and that the condemnation proceeding sought to acquire their properties for a "purely private purpose". (*Id.*, ¶88);

f) The Sixth Claim for Relief contains no substantive allegations but simply asserts a claim for injunctive relief. (*Id.*).

As is apparent, none of the pled claims presented a claim of unconstitutional exaction, an argument that surfaced only in the opposition to the motion to dismiss, thus explaining the District Court's characterization of the argument as "new". (Pet. App. at 11).

Even assuming Petitioners' exaction claim is not beyond review, Petitioners' claim still fails. Petitioners have premised their claim upon 42 U.S.C. § 1983. However, section 1983 provides a remedy and does not by itself create any substantive rights. *Wilson v. Garcia*, 471 U.S. 261, 278 (1985). To state a cause of action under Section 1983, Petitioners must allege that some person has deprived them of a federal right acting under color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

In order for private parties, such as G&S, to be held liable under Section 1983, it must be shown that such private parties were willing participants in joint activity with the state actors. *Ginsberg v. Healy Car & Truck Leasing, Inc.*, 189 F.3d 268, 271 (2d Cir. 1999); *Annunizato v. The Gan, Inc.*, 744 F.2d 244, 249 (2d Cir. 1984). The complaint must allege, with some

particularity, overt acts of the private defendants which were jointly undertaken with the state actors or reasonably related to a conspiracy with state actors. *Elmarsi v. England*, 111 F. Supp. 2d 212, 217-218 (E.D.N.Y. 2000), citing *Fariello v. Rodriquez*, 148 F.R.D. 670, 677 (E.D.N.Y. 1993), *aff'd*, 22 F.3d 1090 (2d Cir. 1994).

According to the Amended Complaint, the only acts allegedly committed by G&S and Wasser in the three years prior to suit are their attendance, at the "direction of" the Village, at a settlement meeting on November 5, 2003. At this meeting, Wasser allegedly demanded $800,000 or else he would cause the Village to commence condemnation proceedings against the properties owned by Petitioners within the MUR District. (Am. Compl. ¶48). Wasser is also said to have alternatively demanded a partnership interest in the CVS Project. (*Id.*). Wasser allegedly based his $800,000 demand upon his estimate that the profit on the CVS Project was worth $2,000,000. (*Id.* at 49). Shortly after Petitioners rejected Wasser's alleged proposals, condemnation proceedings were brought. (*Id.* at 50).

There is no allegation that the Village had any foreknowledge of Wasser's proposal, much less that the Village joined in it or was willing to support it, even though the Village's approval would be necessary to change the boundaries of the MUR District and to amend the LADA so to eliminate G&S' obligation to develop this part of the project. As Petitioners were well aware in 1999 (Pet. App at 26), such changes required a vote of the elected Village Board of Trustees.

While Petitioners point to their general allegation that G&S engaged in an "unlawful course of conduct with the actual knowledge or approval of" the Village (Pet. at 5 n.3), this does not satisfy the requirement that, to make out a case against a private party under Section 1983, the complaint must allege particular acts which are claimed to have been jointly undertaken

with the state actors. While the Amended Complaint alleges that G&S made a demand, it does not allege that governmental representatives were present and, if so, whether they concurred, and, if not, whether they later concurred.

Further, Petitioners' attempt to characterize G&S' settlement proposals as a payment to avoid condemnation is belied by the provisions of the LADA. Under the LADA, G&S had the right to develop all of the property in the MUR District, a right that it had obtained by making the winning proposal to the Village (Am. Compl. Ex. 1 at 2). It had both the right and the responsibility to acquire (and pay for) title to all of the property in the MUR District. (*Id.* at 11). Failure to do so could constitute a default, giving rise to actions by the Village against G&S. (*Id.* at 51). G&S had a concomitant responsibility under the LADA to undertake the development in accordance with the approved plans, including the responsibility to develop and construct the required public improvements. (*Id.* at 37). Thus, even if Wasser did offer to forego G&S' right to ask the Village to condemn Petitioners' property, he was offering to relinquish a legal right he had under the LADA. Petitioners have not here suggested that there is anything wrong with a private party asking for compensation to relinquish a legal right, particularly where doing so would have exposed him to liability (i.e., the Village's right to sue G&S for failing to develop all of the District) .

As the District Court found below (Pet. App. at 14), state law does not require the condemnor to negotiate with a private property owner in good faith prior to seeking to acquire title to the property. Thus, the Village did not have any obligation to negotiate with Petitioners and G&S and Wasser, non-parties to the condemnation proceeding, also had no obligation to negotiate with Petitioners. That the Village, G&S and Wasser did meet with Petitioners and conveyed a proposal that Petitioners found unacceptable does not give them any substantive claims.

A failure to acquire the Petitioners' properties would have had ramifications on the Village as well. The redevelopment of Port Chester had been contemplated for over twenty years, and the Village wanted to complete the project. Prior to the issuance of the Determination and Findings, Petitioners were unable to convince CVS to develop their properties. (Pet. App. at 24-25). That being said, taking Petitioners' properties out of the MUR would not fulfill the Village's goal of eliminating a blighted area. Finally, since Petitioners allege that they rejected the offer (Am. Compl. At ¶48), Petitioners have not articulated any basis for damages. *Printers II, Inc. v. Prof'ls Pub'g, Inc.*, 784 F.2d 141, 148 (2d Cir. 1986).

Petitioners' claim is in reality a collateral attack against the public use determination. The Village issued its Determination and Findings, which included its public use determination, in July 1999. Petitioners did not challenge the Determination and Findings. The fact that G&S had both the right and the responsibility to acquire (and pay for) title to all of the property in the MUR District does not convert the use from public to private. Moreover, once the public use determination was made, the fact that condemned properties were turned over to a developer to effectuate the public use, does not convert that use to a private one. *See Berman*, 348 U.S. at 35-36 ("Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.").

IV. Petitioners' Constitutional Exactions Argument Presents No Compelling Reason To Grant The Petition

In any event, Petitioners' theory that Respondents' conduct is actionable under *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1974) does not present any compelling reason for granting the writ.

While Petitioners maintain that since *Dolan* this Court has only discussed the exactions doctrine in *dicta* (Pet. at 22), any discussion of the exactions doctrine in the context of this case would likewise be *dicta*: first, because the case has been dismissed as untimely, and second, because the exactions doctrine is not implicated in this matter.

The law permits governmental entities to impose conditions upon land use applications provided there is an essential nexus between the harm to be avoided and the condition. In *Nollan*, *supra*, the applicant sought a permit to demolish a seaside home and rebuild and the government conditioned the permit on the granting of an easement for public beach access. In *Dolan*, *supra*, the municipality required the land owner to dedicate a portion of his property sought to be developed to a storm drainage system and for a pedestrian/bicycle pathway as a condition for a building permit.

As the District Court properly recognized, Petitioners did not have any conditions placed upon the use of their property while they were in ownership. (Pet. App. at 11). Further, unlike the situations in *Nollan* and *Dolan*, here is no allegation that the duly authorized governmental officials imposed any conditions through an officially sanctioned communication or resolution.

Based on the facts set forth in the Amended Complaint, there was a pre-existing 1999 finding of public purpose for condemnation that went unchallenged by Petitioners, (Am. Compl. ¶31), even though they received notice of the hearings (*Id.)* and knew that some of their property was located within the zone. (Pet. App. at 24-27). All that Petitioners claim is that the Village refused to process their application to re-zone their property so as to remove it from the project area. (Am. Compl. ¶¶53-54). However, since there was a valid, unchallenged public purpose finding, Petitioners had no substantive right to demand

that their property be excluded from the urban renewal area, particularly where Petitioners have never claimed that the inclusion of some of their properties within the urban renewal area was irrational.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

ALAN D. SCHEINKMAN
Counsel of Record
DELBELLO DONNELLAN
WEINGARTEN TARTAGLIA
WISE & WIEDERKEHR, LLP
MATTHEW S. CLIFFORD
One North Lexington Avenue
White Plains, NY 10601
(914) 681-0200

MARK S. TULIS
OXMAN, TULIS, KIRKPATRICK,
WHYATT & GEIGER, LLP
120 Bloomingdale Road
White Plains, NY 10605
(914) 422-3900

JOHN E. WATKINS, JR.
WATKINS & WATKINS, L.L.P.
175 Main Street
White Plains, NY 10601
(914) 428-1292

Counsel for Respondents